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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 INTERNATIONAL GAME
11 TECHNOLOGY, et al.,

12 Plaintiff(s),

13 v.

14 ILLINOIS NATIONAL INSURANCE CO.,

15 Defendant(s).

Case No.: 2:16-cv-2792-APG-NJK

16 **Order**

(Docket Nos. 63, 65)

17 Pending before the Court are Plaintiffs' motion to amend the scheduling order and motion
18 for leave to file a second amended complaint. Docket Nos. 63, 65. The Court has considered
19 Plaintiffs' motions, Defendant's response, and Plaintiffs' reply. Docket Nos. 63, 65, 70, 75. The
20 Court finds the motions properly resolved without a hearing. *See* Local Rule 78-1. For the
21 following reasons, the Court **GRANTS** Plaintiffs' motion for leave to file a second amended
22 complaint, Docket No. 65.¹ The Court **DENIES** Plaintiffs' motion to amend the scheduling order,
23 Docket No. 63.

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26 ¹ It is within a magistrate judge's authority to grant a motion for leave to amend. *See, e.g.,*
27 *Vandehey v. Real Soc. Dynamics, Inc.*, 2017 WL 4411042, at *1 n.4 (D. Nev. Oct. 4, 2017) (citing
28 *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1102 n.1 (9th Cir. 1985)
and *Morgal v. Maricopa Cty. Bd. Of Supr's*, 284 F.R.D. 452, 458 (D. Ariz. 2012).

1 **I. Relevant Background**

2 On July 13, 2017, Plaintiffs filed a motion for leave to file an amended complaint. Docket
3 No. 23. Plaintiffs sought to add claims alleging bad faith and violations of Nevada’s unfair claims
4 practices statute. *See generally id.* On March 8, 2018, United States District Judge Andrew P.
5 Gordon granted in part and denied in part Plaintiffs’ motion. Docket No. 59. Plaintiffs were
6 permitted to add the following bad faith claims to their complaint: that Defendant unreasonably
7 denied coverage based on timeliness of notice of the claims at issue and that Defendant refused
8 without cause to defend and indemnify Barcrest and Plaintiffs with respect to the Italian claims
9 and the Global Draw lawsuit.² *Id.* at 3-4. Plaintiffs were also permitted to add unfair claims
10 practices claims that Defendant allegedly misrepresented the policy and the facts surrounding the
11 timeliness of the Global Draw claim and that Defendant allegedly failed to promptly respond to
12 the Global Draw claim.³ *Id.* at 6-7. Plaintiffs filed their amended complaint on March 20, 2018
13 and, on April 5 and 6, 2018, filed the instant motion to amend the scheduling order and motion for
14 leave to file a second amended complaint. Docket Nos. 63, 65. Plaintiffs request leave to add new
15 factual information to their current causes of action “based on documents and deposition testimony
16 provided by INIC over the last several months” and to add a request for punitive damages and
17 attorneys’ fees and costs. Docket No. 65 at 10.

18 **II. Standards**

19 When a party moves to amend the pleadings after the expiration of the deadline established
20 in the scheduling order, courts review the motion through a two-step process. First, courts treat
21 the motion as seeking to amend the scheduling order, which is governed by the “good cause”

22 ² Judge Gordon denied Plaintiffs’ motion as to adding the claim that Defendant acted in
23 bad faith by denying Plaintiffs’ claim for the Global Draw lawsuit based on the breach of contract
24 exclusion, stating that Defendant’s reliance on the breach of contract exclusion “is not
unreasonable, or at least the proposed allegations do not sufficiently allege INIC knew or acted in
reckless disregard....” Docket No. 59 at 5.

25 ³ Judge Gordon denied Plaintiffs’ motion as to adding the unfair claims practices claims
26 that Defendant misrepresented the facts or the policy’s provisions related to the breach of contract
27 exclusion. Docket No. 59 at 7. Plaintiffs’ unfair claims practices claim that Defendant did not
28 promptly respond to the Italian cases was also denied because the claim was time-barred, although
Plaintiffs were permitted to file an amended complaint if sufficient facts were presented as to its
timeliness. *Id.* at 8.

1 standard outlined in Fed.R.Civ.P. 16(b). *See, e.g., Johnson v. Mammoth Recreations, Inc.*, 975
2 F.2d 604, 608 (9th Cir. 1992). “Rule 16(b)’s ‘good cause’ standard primarily considers the
3 diligence of the party seeking the amendment.” *Id.* at 609. In particular, courts look to whether
4 the deadline set in the scheduling order “cannot reasonably be met despite the diligence of the
5 party seeking the extension.” *Id.* Although prejudice to the opposing party may also be
6 considered, the focus of the inquiry is on the movant’s reasons for seeking modification. *Id.* “If
7 that party was not diligent, the inquiry should end.” *Id.* The party seeking amendment bears the
8 burden of establishing diligence. *See, e.g., Morgal*, 284 F.R.D. at 460.

9 When “good cause” has been established under Fed.R.Civ.P. 16(b), courts will then
10 examine whether amendment is proper under the standards outlined in Fed.R.Civ.P. 15(a).
11 Fed.R.Civ.P. 15(a) provides that “[t]he court should freely give leave [to amend] when justice so
12 requires,” and there is a strong public policy in favor of permitting amendment. *Bowles v. Reade*,
13 198 F.3d 752, 757 (9th Cir. 1999). As such, the Ninth Circuit has made clear that Fed.R.Civ.P.
14 15(a) is to be applied with “extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
15 1048, 1051 (9th Cir. 2003) (*per curiam*). Under Fed.R.Civ.P. 15(a), courts consider various
16 factors, including: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility
17 of the amendment; and (5) whether the plaintiff has previously amended the complaint. *See id.* at
18 1052. These factors do not carry equal weight, however, and prejudice is the touchstone of the
19 analysis. *See id.* The party opposing the amendment bears the burden of showing why leave to
20 amend should be denied. *See, e.g., Desert Protective Council v. U.S. Dept. of the Interior*, 927 F.
21 Supp. 2d 949, 962 (S.D. Cal. 2013) (citing *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530-
22 31 (N.D. Cal. 1989)).

23 **III. Analysis**

24 **A. Amending the Scheduling Order**

25 The deadline to amend the pleadings expired on July 13, 2017. Docket No. 17 at 3.
26 Nothing prevents a party from filing a motion to amend pleadings after the expiration of that
27 deadline. Any such motion is required to address both whether good cause exists for the late
28 amendment under Fed.R.Civ.P. 16, in addition to whether sufficient grounds exist for amendment

1 under Fed.R.Civ.P. 15. As Plaintiffs’ motion for leave to amend addresses both standards, the
2 Court finds that amending the scheduling order is unnecessary.

3 Accordingly, Plaintiffs’ motion to amend the scheduling order, Docket No. 63, is DENIED.

4 B. Leave to Amend the Complaint

5 i. *Good Cause under Fed.R.Civ.P. 16(b)*

6 Plaintiffs submit that good cause exists to modify the scheduling order because Defendant
7 refused to produce certain discovery until the Court compelled it. Docket No. 65 at 12-15; *see*
8 *also* Docket No. 47. Plaintiffs further submit that certain deposition testimony, on which the
9 instant motion is based in part, was not obtained until February 2018, seven months after the
10 deadline to amend pleadings expired. Docket No. 65 at 9. In response, Defendant submits that
11 Plaintiffs did not diligently pursue the desired discovery and should have requested to extend the
12 July 13, 2017 deadline. Docket No. 70 at 11-12.

13 In reply, Plaintiffs cite to *Brown v. Clark Cty. Det. Ctr. and Bermuda Rd. Properties, LLC*
14 *v. Ecological Steel Sys., Inc.* for the proposition that good cause exists when information
15 supporting an amended complaint is obtained after the deadline to amend pleadings expires.
16 Docket No. 75 at 12 (citing 2018 WL 1457292, at *3 (D. Nev. Mar. 23, 2018) and 2015 WL
17 4603485, at *2 (D. Nev. July 30, 2015)). In *Brown*, the Court granted leave to amend the complaint
18 where the defendants produced discovery over one year after the deadline to amend pleadings
19 expired. *See* 2018 WL 1457292, at *3. In *Bermuda Rd. Properties, LLC*, the Court granted leave
20 to amend the complaint where the defendant produced discovery three months after the deadline
21 to amend pleadings expired. *See* 2015 WL 4603485, at *2.

22 The more prominent issue as to whether good cause exists, however, is whether Plaintiffs
23 should have filed their motion for leave to file a second amended complaint sooner. Plaintiffs
24 submit that “it was reasonable and appropriate [] to wait until the Court ruled on its initial Motion
25 to Amend before seeking further amendment” to claims “the Court had not yet allowed Plaintiffs
26 to bring.” Docket Nos. 65 at 15, 70 at 4. Plaintiffs further submit that the Court’s order on their
27 initial motion for leave to amend “clarified the scope and sufficiency” of their initial claims, and
28 that the “recently obtained discovery” adds additional facts pursuant to the Court’s order. Docket

1 No. 65 at 15; *see also* Docket No. 59 at 8 (finding that Plaintiffs failed to adequately allege certain
2 claims and, in regard to one claim, permitting Plaintiffs to file an amended complaint if and when
3 sufficient facts exist without filing another motion for leave).

4 In response, Defendant submits that the second motion for leave to amend is “based largely
5 on information that Plaintiffs have had in their possession since, at least the middle of January”
6 and, therefore, should have filed their motion sooner. Docket No. 70 at 13. Defendants further
7 submit that Plaintiffs could have supplemented their initial motion for leave to amend their
8 complaint that was pending before the Court, as opposed to waiting for the Court to issue a ruling.
9 *Id.*

10 The Court is not persuaded by Defendant’s argument. Plaintiffs waited less than one month
11 after the order on their initial motion for leave to amend was issued to file the instant motion.
12 *Compare* Docket No. 59 *with* Docket No. 65. Additionally, the last deposition upon which the
13 second motion for leave to amend is partially based occurred on February 19, 2018, less than two
14 months before Plaintiffs filed the instant motion. Docket No. 65 at 9. In *Brown*, the plaintiff filed
15 his motion for leave to amend two months after obtaining the necessary discovery. *See* 2018 WL
16 1457292, at *3. In *Bermuda*, the plaintiff filed its motion for leave to amend over two years after
17 it obtained the necessary discovery.⁴ *See* 2015 WL 4603485, at *2; *Cf. AmerisourceBergen Corp.*
18 *v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (finding, *inter alia*, that the plaintiff’s
19 motion for leave to amend was untimely because it was filed fifteen months after the plaintiff
20 obtained the new discovery).

21 In the instant case, the Court finds that Plaintiffs were reasonable in waiting for the order
22 on their initial motion for leave to amend before filing a second motion. Moreover, the Court finds
23 that Plaintiffs were diligent in their discovery practices. Docket No. 32; *see also* Docket No. 65
24 at 7-9, 11-12. The Court therefore finds that good cause exists for the late amendment under
25 Fed.R.Civ.P. 16(b).

26 ⁴ In *Bermuda*, however, the Court had granted summary judgment on all of the plaintiff’s
27 claims one month after the necessary discovery was obtained. *See* 2015 WL 4603485, at *2. The
28 case’s legal posture drastically changed one year later when the summary judgment order was
reversed, prompting the plaintiff’s motion for leave to amend. *Id.*

1 ii. *Whether Amendment is Proper under Fed.R.Civ.P. 15(a)*

2 Following a finding of good cause, the Court turns to whether justice requires allowing
3 amendment in this case. Courts consider the five factors originally established in *Foman v. Davis*
4 to determine whether leave to amend should be granted. 317 U.S. 178, 182 (1962); *see e.g.*,
5 *Eminence Capital, LLC*, 316 F.3d at 1051; *see also infra* Section II. Of the five factors, Defendant
6 argues only that amendment should be denied because it would be futile. *See generally* Docket
7 No. 70. Defendant fails to argue that it would be unduly prejudiced by the amendment or that the
8 motion was filed in bad faith. *Id.* Plaintiffs sought to amend their complaint once before, which
9 the Court does not find weighs against granting leave to amend a second time, especially in light
10 of the general policy favoring amendment. Docket No. 23; *see also Bowles*, 198 F.3d at 757.

11 Additionally, the Court’s discussion and finding on the timeliness of Plaintiffs’ motion
12 appropriately applies to the analysis of undue delay. *See infra* Section III(B)(i). “A strong
13 presumption against a finding of undue delay exists when a case is still in discovery,” has no trial
14 date pending, or if a pretrial conference has yet to be scheduled. *Hologram USA, Inc. v. Pulse*
15 *Evolution Corp.*, 2015 WL 316900, at *3 (D. Nev. Jan. 23, 2015) (citing *DCD Programs, Ltd. v.*
16 *Leighton*, 833 F.2d 183, 187-88 (9th Cir. 1987)). *But cf. AmerisourceBergen Corp.*, 465 F.3d at
17 954 (affirming the district court’s denial of the plaintiff’s motion for leave to amend because “even
18 though eight months of discovery remained,” the plaintiff advanced “different legal theories and
19 [] different facts,” which would have “unfairly imposed potentially high, additional litigation
20 costs”). Plaintiffs filed the instant motion two months before the June 12, 2018 discovery cut-off.
21 Docket No. 65. Further, a trial date has not yet been set. Docket No. 56. Moreover, the Court
22 finds that Plaintiffs’ factual amendments do not propose novel legal theories that would result in
23 additional discovery and litigation costs.

24 Accordingly, the Court finds that there is no bad faith, undue delay, or prejudice to the
25 opposing party in amending the complaint a second time.

26 a. *Futility*

27 Defendant contends that the proposed amendments are futile. *See generally* Docket No.
28 70. Courts are empowered to deny leave to amend based on the futility of the amendment. *See*

1 *e.g.*, *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015). Nonetheless, “[d]enial of leave
2 to amend on this ground is rare. Ordinarily, courts will defer consideration of challenges to the
3 merits of a proposed amended pleading until after leave to amend is granted and the amended
4 pleading is filed.” *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003); *see also*
5 *Steward v. CMRE Fin’l Servs., Inc.*, 2015 WL 6123202, at *2 (D. Nev. Oct. 16, 2015). Deferring
6 ruling on the sufficiency of the allegations is preferred in light of the more liberal standards
7 applicable to motions to amend and the fact that the parties’ arguments are better developed
8 through a motion to dismiss or motion for summary judgment. *See, e.g., In re Dynamic Random*
9 *Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1135-36 (N.D. Cal. 2008).

10 As a preliminary matter, Defendant’s response dives deeply into the merits of Plaintiffs’
11 amendments, surpassing the standards and principles that govern a motion for leave to amend. *See*
12 *generally* Docket No. 70. Although the futility analysis determines whether the proposed
13 amendment would survive a challenge under Fed.R.Civ.P. 12(b)(6)’s plausibility standard, such
14 analysis must nonetheless be conducted with the understanding that the appropriate response to a
15 motion for leave to amend is not one that bears a resemblance to a motion for summary judgment.
16 *Cf. Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *see also GMAC Mortgage,*
17 *LLC v. Nevada Association Services, Inc.*, 2018 WL 487101, at *2 (D. Nev. Jan. 5, 2018) (granting
18 the plaintiff’s motion for leave to amend, in part, because “Defendants have effectively attempted
19 to transform their response to the pending motion for leave to amend into a motion to dismiss or
20 for summary judgment”); *see generally Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Otherwise, a
21 plaintiff may be deprived of the opportunity to test his or her claims on the merits in accordance
22 with the proper briefing procedures. *E.g., Foman*, 317 U.S. at 182 (“If the underlying facts or
23 circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded
24 an opportunity to test his claim on the merits”).

25 The Court does not address each and every piece of new factual information added in
26 Plaintiffs’ proposed second amended complaint. *See e.g.*, Docket No. 65-2 at 4-5, 9-16, 19, 21-
27 22, 30-33. Nonetheless, the Court addresses the adequacy of some of Plaintiffs’ allegations and
28 factual amendments. Judge Gordon’s order at Docket No. 59 found, *inter alia*, that Plaintiffs failed

1 to adequately allege that Defendant acted in bad faith by denying their claim based on the breach
2 of contract exclusion. Docket No. 59 at 5. Plaintiffs’ proposed second amended complaint alleges
3 that the policy under which Defendant granted coverage to Scientific Games International (“SGI”)
4 contains the same substantive terms and conditions as its policy, under which Defendant denied
5 coverage. Docket No. 65-2 at 31. In comparing Plaintiffs’ initial motion for leave to amend with
6 the instant motion, the Court finds that Plaintiffs have added new factual information that
7 adequately alleges this bad faith claim. The Court therefore grants leave to amend to add the
8 relevant information.

9 The Court also finds that Plaintiffs have adequately alleged that Defendant acted in bad
10 faith by failing to notify Plaintiffs that Defendant was defending Barcrest under SGI’s policy. *Id.*
11 at 25, 34. Although Defendant submits that it did not owe Plaintiffs a duty to notify them of
12 decisions it was making for other insureds, Plaintiffs allege that, not only did Defendant have a
13 fiduciary duty to notify them, but that its failure to do so “deprived Plaintiffs of a defense in the
14 Global Draw litigation.” *Id.* at 25. The Court therefore grants leave to amend to add the relevant
15 information.

16 Moreover, Defendant fails to meaningfully develop its argument as to why leave to amend
17 should be denied as to Plaintiffs’ request for punitive damages and attorneys’ fees and costs. *See*
18 Docket No. 70 at 4, 9-10; *cf. Kor Media Group, LLC v. Green*, 294 F.R.D. 579, 582 n.3 (D. Nev.
19 2013) (courts only address arguments that are meaningfully developed). The Court therefore
20 grants leave to amend to add these requests for relief as unopposed. Local Rule 7-2(d).

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1 **IV. Conclusion**

2 For the reasons discussed more fully above, the Court **GRANTS** Plaintiffs' motion for
3 leave to file a second amended complaint, Docket No. 65, and **DENIES** Plaintiffs' motion to
4 amend the scheduling order, Docket No. 63. Plaintiffs shall promptly file and serve the second
5 amended complaint. *See* Local Rule 15-1.

6 IT IS SO ORDERED.

7 Dated: June 15, 2018

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NANCY J. KOPPE
United States Magistrate Judge